Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of	)	
	)	
SAN DIEGO MDS COMPANY	)	File No. 5790-CM-R-91
	)	
For Renewal of License for Multipoint Distribution Service Station WHT559, San Diego, California	)	
	)	

ORDER ON RECONSIDERATION

Adopted: November 12, 2003 **Released: November 13, 2003**

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. On July 1, 1996, San Diego MDS Company (San Diego MDS) filed a petition for reconsideration[1] of the May 30, 1996 dismissal[2] of its application to renew Multipoint Distribution Service (MDS) Station WHT559, San Diego, California.[3] On July 1, 1996, San Diego MDS concurrently filed a request for Special Temporary Authority (STA) to continue operating Station WHT559 pending Commission action on the Petition.[4] For the reasons discussed below, we deny the Petition and dismiss the STA request as moot.

II. BACKGROUND

2. On April 24, 1974, San Diego MDS filed an application for a construction permit for a new MDS Station on Channel 2 at San Diego, California.[5] That application was granted on November 29, 1983. On January 4, 1984, San Diego MDS was issued a license for Station WHT559.[6]

3. On April 1, 1991, San Diego MDS filed an application to renew Station WHT559. On the same date, San Diego MDS also filed a Contingent Request for Waiver of Section 21.303(d) of the Commission's Rules (Waiver Request).[7] San Diego MDS therein contended that at the time that it filed

[1] San Diego MDS Company, Petition for Reconsideration (filed Jul. 1, 1996) (Petition).

[2] Letter from Daniel R. Ball, Esq., Attorney, MDS Section, Video Services Division, Mass Media Bureau, FCC, to Mr. James E. Lindstrom, Partner, San Diego MDS Company (dated May 30, 1996) (Ball Letter).

[3] FCC File No. 57950-CM-R-91 (filed Apr. 1, 1991) (renewal application).

[4] *See* Letter from Paul J. Sinderbrand, Esq., Wilkinson, Barker, Knauer & Quinn, to Mass Media Bureau, FCC (July 1, 1996) (STA Request).

[5] File No. BPMD-7450092.

[6] File No. BLMD-8450043.

[7] San Diego MDS Company, Contingent Request for Waiver of Section 21.303(d) of the Commission's Rules (Apr. 1, 1991) (Waiver Request).

the waiver request, Station WHT559 had been operating in compliance with Section 21.303(d) because it was fully constructed and periodically broadcasting signals over the air from its transmitter.[8] Although San Diego MDS conceded that it had been unsuccessful in attracting MDS customers, it argued that the Commission did not require "such licensees to have customers."[9]

4. By letter, dated May 30, 1996, the Video Services Division (Division) of the former Mass Media Bureau denied the waiver request and dismissed the renewal application.[10] The Division rejected San Diego MDS's argument that the "periodic broadcasting of signals" constituted service under Section 21.303(d) of the Commission's Rules.[11] Specifically, the Division found the proposition unsupported, unconvincing, and contrary to the Commission's stated purpose in adopting the rule to ensure the efficient use of the spectrum.[12] In addition, the Division noted that San Diego MDS "had thirty days, beginning with the adoption of § 21.303(d) on November 9, 1987, to meet the requirements of that rule. [San Diego MDS] did not do so. Instead, [San Diego MDS] retained its license and provided no service whatsoever, except for 'periodically broadcast[ing] signals . . .' for almost three and a half years before requesting waiver of § 21.303(d)."[13] The Division concluded that application of the rule in this instance reinforces the reporting requirements and reassigns the spectrum from those who have not provided service and makes it available to those wishing to do so.[14] It therefore denied the waiver request because allowing San Diego MDS to retain the license after years of non-use would frustrate the purpose of the rule and not be in the public interest.

5. San Diego MDS sought reconsideration of the dismissal on July 1, 1996. On the same date, San Diego MDS also filed a request to operate pursuant to STA pending action on its renewal application. On April 17, 1998, San Diego MDS filed a Supplement to Petition for Reconsideration.[15]

III. DISCUSSION

6. The PFR contends that the Division erred in denying San Diego MDS's request for waiver of Section 21.303(d) of the Commission's Rules and therefore wrongly dismissed the renewal application. According to the PFR,[16] the waiver request "was necessitated by ambiguities as to the meaning of Section 21.303(d) and tales within the wireless cable industry of inconsistent interpretations."[17] The PFR alleges that San Diego MDS was operating Station WHT559 "in a manner

[8] Waiver Request at 1.

[9] *See* Waiver Request at ii.

[10] *See* Ball Letter.

[11] *See* Ball Letter at 1.

[12] *See id.* (internal citations omitted).

[13] *Id* at 2. The Division found that the initial period of nonuse in this matter began on January 4, 1984. *Id.*

[14] *See id.*

[15] San Diego MDS Company, Supplement to Petition for Reconsideration (Apr. 17, 1998) (Supplement).

[16] The arguments raised by San Diego MDS in the STA request are also found in the PFR. We find that our discussion of the PFR fully addresses all matters raised by San Diego MDS in the STA request.

[17] PFR at 3.

that complied with the informal staff advice [it] received as to the requirements of Section 21.303(d)."[18] The PFR asserts that, "[u]nder such circumstances, the law is simple and straightforward – the Commission cannot penalize applicants for attempting to comply with ambiguous requirements."[19]

7. We find that the Division was correct in denying the waiver request and dismissing the renewal application. The express language of Section 21.303(d) of the Commission's Rules requires the licensee to take one of three actions "if any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed. . . ."[20] The three options are (1) submitting its station license for cancellation, (2) filing an application for modification of the station license to delete the unused frequency, or (3) requesting a waiver pursuant to Section 21.303(d)(3).[21] Significantly, prior to the adoption of Section 21.303(d), the Commission's Rules did not require licensees to relinquish unused frequencies.[22] The Commission found that, "[i]n addition to preventing others from using the spectrum, this results in the Commission being unable to discern when spectrum is not being used or is being underutilized."[23] Therefore, the Commission adopted Section 21.303(d) to ensure the efficient use of the spectrum by requiring licensees to submit licenses covering unused spectrum to the Commission for cancellation.[24]

8. San Diego MDS argues that the rule is ambiguous because "the Commission had never formally addressed what sort of use was required to avoid license cancellation."[25] We reject that argument. The rule explicitly required San Diego MDS to provide "service." San Diego MDS does not explain how the periodic broadcasting of signals that no person received could possibly constitute "service" to any person. Moreover, San Diego MDS's interpretation of the rule, which would allow a licensee to avoid license cancellation by broadcasting a signal once a year that nobody receives, is plainly inconsistent with the Commission's underlying purpose of ensuring that spectrum is used efficiently and effectively.[26] While we agree with San Diego MDS that the Commission may not dismiss an application for failure to comply with an ambiguous rule,[27] as discussed above, the rule is not ambiguous as applied to San Diego MDS's situation.

9. Moreover, we reject San Diego MDS's claim that reliance on informal staff advice entitles it to a finding of having been in compliance with Section 21.303(d). Based upon the record before us, it is unclear whether San Diego MDS in fact received advice that its operations complied with

[18] *Id.*

[19] *Id.* at 4.

[20] 47 C.F.R. § 21.303(d).

[21] *See* 47 C.F.R. § 21.303(d)(1)-(3).

[22] *See* Revision of Part 21 of the Commission's Rules, *Report and Order,* 2 FCC Rcd 5713, 5724 ¶ 82 (1987) (*Part 21 R&O*)).

[23] *Id.*

[24] *See id.*

[25] PFR at 3.

[26] *See Part 21 R&O*.

[27] PFR at 4-5 (*citing Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987); *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987)).

Section 21.303(d). In any event, parties doing business before the Commission may not claim reliance on informal staff advice to excuse non-compliance with regulatory requirements.[28]

10. When Section 21.303(d) of the Commission's Rules became effective on November 9, 1987,[29] San Diego MDS had thirty days to bring Station WHT559 into compliance with its requirements. As the Division previously noted, San Diego MDS failed to do so. San Diego MDS does not challenge the finding that that the initial period of nonuse in this matter began on January 4, 1984.[30] Rather, San Diego MDS faults market forces, economic conditions, and regulatory burdens for its inability to find a customer.[31] However, these factors were already considered by the Commission in adopting Section 21.303(d).[32] The Commission found that twelve months "should be more than enough time for new licensees to begin providing service, if, indeed there is any demand."[33] The Commission explained that, where a licensee such as San Diego MDS is unable to find a customer within that period, it might obtain additional time by seeking a waiver pursuant to Section 21.303(d)(3).[34] Yet, San Diego MDS made no attempt to seek such a waiver until it became necessary to file a renewal application for Station WHT559 on April 1, 1991 – more than three and a half years after the adoption of Section 21.303(d) and more than

[28] *See, e.g.,* Mary Ann Salvatoriello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4708 (1991) ("Erroneous advice received from a government employee is insufficient [to warrant estoppel against the government], particularly when the relief requested would be contrary to an applicable statute or rule."); Texas Media Group, Inc., *Memorandum Opinion and Order*, 5 FCC Rcd 2851, 2852 (1990), *aff'd sub nom*. *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991) ("It is the obligation of interested parties to ascertain facts from official Commission records and files and not rely on statements or informal opinions by the staff."); Hinton Telephone Company, *Memorandum Opinion and Order on Reconsideration*, 10 FCC Rcd 11625, 11637 (1995) ("The Commission has specifically held that parties who rely on staff advice or interpretations do so at their own risk.").

[29] 52 Fed. Reg. 37775-01 (Oct. 9, 1987).

[30] *See, e.g.,* Waiver Request; PFR.

[31] *See, e.g.,* Waiver Request at 2 (attributing lack of success in attracting clients to "existing marketplace conditions . . . as well as to regulatory restraints . . . .").

[32] Indeed, the instant waiver request effectively seeks reconsideration of the *Part 21 R&O*. However, the Commission neither "must nor should tolerate evisceration of a rule by waivers." *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[33] *Part 21 R&O*, 2 FCC Rcd at 5724 ¶ 83.

[34] *See id.* San Diego MDS failed to submit with the waiver request any evidence that the frequency will be used within six months of the initial period of nonuse. In fact, the waiver request simply recounts San Diego MDS's unsuccessful efforts in attracting customers. For example, the waiver request notes that "[m]ost recently, in November of 1990, Licensee, through its consultants, contacted several minority broadcasting executives about the possibility of utilizing MDS and MMDS in a multi-market communications network, including [Station WHT559] . . ., to encourage the development of minority-oriented programming." Waiver Request at 13. Such general and unsupported statements fall far short of the standard necessary to demonstrate that the facilities would be used within six months of the initial period of nonuse. They also fail to address the Division's finding that the initial period of nonuse in this matter began on January 4, 1984. However, even if we were to assume, *arguendo*, that the waiver request was timely filed, the November of 1990 "contact" occurred six months prior to the filing of the waiver request. Therefore, on its face, even the most the recent "contact" concerning the general "possibility" of the use of Station WHT559 failed to satisfy the demonstration of use requirement necessary to warrant a waiver under 47 C.F.R. § 21.303(d)(3).

seven years after the station was first authorized to provide service. We find the waiver request submitted was untimely filed. We find nothing in the record to excuse San Diego MDS's failure to comply with Section 21.303(d) of the Commission's Rules. We therefore affirm the Division's denial of the waiver request.

11. San Diego MDS also argues that the action in this case is inconsistent with a series of letter rulings by staff attorneys in the Mass Media Bureau granting requests for waiver of Section 21.303(d).[35] We need not address whether the actions San Diego MDS cites are inconsistent with the action in this case because the staff letters San Diego MDS cites are not binding precedent. As shown above, the Commission clearly required that San Diego MDS either submit the license for cancellation or request a waiver of the rule and show that the frequency will be used to provide service within six months after the end of the initial period of nonuse.[36] To the extent that any of the rulings cited by San Diego MDS may have been inconsistent with the Commission's clear policy, we are not bound to follow those decisions.[37] In addition, San Diego MDS supplemented its PFR on April 17, 1998 to bring a third case to our attention.[38] We decline to consider that case for the same reasons we will not consider the two cases San Diego MDS cited in its PFR.

IV. CONCLUSION AND ORDERING CLAUSES

12. For the reasons discussed above, we deny the PFR and dismiss the STA request as moot. We affirm the denial of San Diego MDS's request for waiver of Section 21.303(d) of the Commission's Rules and the dismissal of San Diego MDS's application to renew its license to operate Station WHT559.

13. ACCORDINGLY, IT IS ORDERED that, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed by San Diego MDS Company on July 1, 1996 IS DENIED.

14. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 309 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 309, the request for special temporary authority filed by San Diego MDS Company on July 1, 1996 IS DISMISSED AS MOOT.

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[35] PFR at 5-6, *citing* Letter from Lynne Milne, Senior Attorney, MDS Section, Video Services Division, Mass Media Bureau to Mr. William K. Hoffman, Cleveland Microband Teleservices, Inc. (dated Feb. 23, 1995) (PFR, Exhibit D) and Letter from Daniel R. Ball, Attorney, MDS Section, Video Services Division, Mass Media Bureau to Robert J. Rini, Esq. (dated Mar. 29, 1996) (PFR, Exhibit F).

[36] A third option presented by the rule is to file an application to modify the license in question to delete the unused frequencies. *See* 47 C.F.R. § 21.303(d)(2). Since San Diego MDS did not provide service on any of its frequencies, that option was not pertinent in this case.

[37] *See Jelks v. FCC*, 146 F.3d 878, 881 (1998) (a subordinate body like the Division cannot alter a policy set by the Commission itself), *cert. den.* 119 S.Ct 1045 (1999); *Amor Family Broadcasting Group, v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990) (even if internal inconsistency at a subordinate level were shown, the Commission itself would not be acting inconsistently) *citing Homemakers North Shore, Inc. v. Bowen*, 832 F.2d 408, 413 (7th Cir. 1987); *Continental Cellular*, 6 FCC Rcd. 6834, 6836 n.25 (1991) (The Commission is not bound to apply a decision issued on delegated authority that is contrary to the Commission's Rules).

[38] *See* Supplement.

15. These actions are taken under designated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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